Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, BRENDA K. RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, WOODY DEAN GIBBONS, DEL GORDON d/b/a G.M. Properties, and ORMAN E. McCARTNEY, JR. and ROSALINE O. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated

Petitioners,

v.

CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,

Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, DEL GORDON, d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE Q. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	)
Plaintiffs	)
vs.	) Case No. CIV-93-574-C
CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,	)
Defendants	)
vs.	)
KIRKLAND ROYALTY, INC.,	)
Third Party Defendant, and Additional Defendant to Counterclaims	)

Filed April 14, 1994

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter is before the Court for consideration of defendant Conoco Inc.'s ("Conoco") motion for partial summary judgment on the claims made by plaintiffs. Plaintiffs allege Conoco breached an implied covenant to further develop their mineral interests and that Conoco failed to protect the plaintiffs' mineral interests from drainage. On March 9, 1994, plaintiffs responded to Conoco's motion. On March 24, 1994, Conoco filed a reply. Certain facts were established in connection with a similar motion for summary judgment filed by C.I.G. Exploration, Inc. ("CIGE") as to plaintiffs' claims. Conoco adopts ¶¶ 1,2, 5, 8 and 9-12 of CIGE's statement of undisputed facts. Conoco's Brief at 2 (Feb. 22, 1994). Plaintiffs also adopt their objections to those facts. Plaintiffs' Brief at 1 (March 9, 1994). The Court adopts the undisputed facts announced in its decision of today's date regarding CIGE's

motion for summary judgment. The following additional facts have been established in the pleadings associated with Conoco's motion. The facts the Court finds pertinent to Conoco's motion are listed below. Except where noted, the facts are not in dispute.

1. Ruth Fransen, Martha Harms, Elsie Hinz, Wilson Mahone, Mary Gene McCoy, and Orman E. McCartney, Jr. and Rosaline Q. McCartney, Trustees under the McCartney Family Trust are lessors of Conoco ("Conoco Lessors"). Tim Ruyle, Jeanette Stone, Cassandra Gibbons, and Del Gordon d/b/a G.M. Properties are lessors of C.I.G. Exploration, Inc. ("CIGE Lessors"). **Source**: Plaintiffs' Complaint, ¶¶ 10, 11, 12.

2. Conoco Inc. is the operator of the Meacham No. 1-14 Well and owns an interest in its production. **Source**: Scheduling Conference Memorandum at Stipulated Facts, paragraph III.F, Ex. A to Conoco's motion, ¶ 4; and Complaint at ¶ 19.

3. The Downing No. 1-15 Well is located in Section 15 and was completed in the Red Fork member of the Des Moines common source of supply in April 1981. **Source**: Affidavit of Julie Vap attached as Ex. A to Conoco's motion, ¶ 4.

4. Anson Corporation is the operator of the Downing No. 1-15 Well. **Source**: Affidavit of Julie Vap attached as Ex. A to Conoco's motion, ¶ 4.

5. Conoco owns an interest in production from the Downing No. 1-15 Well. **Source**: Affidavit of Julie Vap attached as Ex. A to Conoco's motion, ¶ 4.

6. Plaintiffs claim CIGE and Conoco breached the impled covenants of their oil and gas leases by failing to develop their leases and by failing to drill an additional well to protect Section 14 from the drainage allegedly caused by the Downing No. 1-15 Well. **Source**: Complaint; Section I of the

Scheduling Conference Memorandum/Status Report.

7. Plaintiffs claim because Conoco is the operator of the Meacham No. 1-14 Well in Section 14, Conoco owes plaintiffs a fiduciary duty and is in breach of that fiduciary duty by failing to develop Section 14 and to protect Section 14 from drainage. **Source**: Complaint; Section I of the Scheduling Conference Memorandum/Status Report.

8. Because Conoco owns an interest in the Downing No. 1-15 Well, the well they believe is responsible for drainage to Section 14, plaintiffs claim Conoco is engaging in fraudulent drainage for which plaintiffs seek punitive damages and cancellation of their leases. **Source**: Complaint; Section I of the Scheduling Conference Memorandum/Status Report.

9. The oil and gas leases of the Conoco Lessors contain a provision excusing

Conoco from liability for breach of any express or implied covenant if compliance is prevented by any regulatory orders, laws, or statutes. **Source**: Oil and Gas Leases, attached as Ex. 2 to Ex. A of Conoco's motion.

10. Conoco adopted ¶ 10 of CIGE's undisputed facts listed in its summary judgment motion. In that paragraph CIGE announced its position that plaintiffs, both by mail and by publication, received sufficient notice of the Commission's proceedings. In connection with CIGE's motion, the CIGE Lessors claimed this fact was in dispute. In the pleadings relating to Conoco's motion, the notice issue is treated with less detail than that given in the pleadings relating to CIGE's motion. In any event, the Commission's 1992 order recognized proper notice had been given. 1992 Order, Findings ¶ 3.

11. Great Bear, the applicant in the proceedings for the 1992 order, assigned its rights and interest in Section 14 to Kirkland Royalty, Inc. ("Kirkland"), subsequent to the issuance of the 1992 order. **Source**: Ex. K to CIGE's motion. In response to Conoco's motion, plaintiffs claim they assigned only a portion of their interests. Plaintiffs did not challenge this information when it was raised in CIGE's motion. See CIGE's Brief at 5, ¶ 11 (Jan. 25, 1994); Plaintiffs' Brief at 1-3 (Feb. 9, 1994).

12. There is no dispute that plaintiffs entered into lease option agreements ("LOAs") with Kirkland. As a result, Kirkland is paying all the expenses of this litigation on plaintiffs' behalf and Kirkland has control of this lawsuit. **Source**: Ex. E and K to CIGE's motion. Plaintiffs respond the LOAs speak for themselves.

13. Plaintiffs Ruth Fransen, Martha Harms, and Elsie Hinz, previously entered into certain other LOAs by which they authorized Great Bear to, among other things, represent their interests before the Oklahoma Corporation Commission and they agreed to grant Great Bear an oil and gas lease contingent upon the release or cancellation of Conoco's oil and gas lease. **Source**: Ex. C to Conoco's Brief, excerpts of the depositions of Harms, Hinz. Plaintiffs do not dispute the existence of the LOAs; however, plaintiffs state they did not execute the LOAs until January 16, 1991, after commencement of the proceedings that led to the 1992 order. The existence of any previous LOAs was not addressed in the pleading relating to CIGE's motion. See CIGE's Brief at 5, ¶ 12 (Jan. 25, 1994); Plaintiffs' Brief at 1-3 (Feb. 9, 1994).

Plaintiffs offer "additional facts." Plaintiffs' Brief at 3-4 (March 9, 1994).

Conoco has discussed certain of these facts. As the Court can adequately reach all issues without reference to plaintiffs' "additional facts," they will not be reprinted here.

As stated in the contemporaneous order granting partial summary judgment to CIGE, the Commission's orders are facially valid and binding until they are modified or vacated. The Commission determined an additional well in Section 14 should not be drilled. Conoco's actions, in light of the Commission's findings, do not constitute a breach of an implied covenant. By operation of the Commission order and a provision in the parties' lease, Conoco cannot be liable for damages for failure to drill an additional well in Section 14. Accordingly, Conoco is entitled to the relief it seeks in this motion.

Plaintiffs argue the same facts that support their claim of breach of an implied duty also support their claim of breach of

a fiduciary duty. Plaintiffs' claim of breach of a covenant and breach of a duty fails as plaintiffs cannot prove an essential element -- that plaintiffs are suffering substantial uncompensated drainage and that another well should have been drilled in Section 14. See Leck v. Continental Oil Co., 971 F.2d 603, 606 (10th Cir. 1992); Ramsey Petroleum Corp. v. Davis, 85 P.2d 427, 431 (Okla. 1938). The Commission determined: 1) the owners in Section 14 are recovering their fair share of gas from the Des Moines common source of supply; 2) there is no need for an additional well to protect Section 14 from drainage; and 3) any drainage occurring in Section 14 is being compensated through other production. Moreover, even if Conoco's actions did constitute a breach, the parties' lease protects Conoco from damages where compliance is prevented by

state law, executive orders, rules, or regulations.

Conoco has moved for summary judgment on plaintiffs' request for punitive damages. Whether an award of punitive damages is appropriate under any remaining theory cannot yet be determined.

Accordingly, with the exception of the punitive damages issue, Conoco is entitled to the relief it seeks in its motion.

IT IS THEREFORE ORDERED Conoco's motion for partial summary judgment is GRANTED except as to plaintiffs' claim for punitive damages, and Conoco is entitled to judgment as a matter of law on plaintiffs' breach of the implied covenants to develop and protect against drainage and plaintiffs' claim for breach of fiduciary duty to develop and protect from drainage. A judgment will enter at the conclusion of the case.

IT IS SO ORDERED this 14 day of April, 1994.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, JEANETTE STONE, JACK STONE, CASSANDRA GIBBONS, DEL GORDON, d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE Q. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	Filed April 14,1994
Plaintiffs	No. CIV-93-574-C
vs.	
CONOCO, INC. (formerly Continental) Oil Company) and C.I.G. EXPLORATION, INC.,	
Defendants	
vs.	
KIRKLAND ROYALTY, INC.,	
Third Party Defendant, and Additional Defendant to Counterclaims	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter is before the Court for consideration of defendant, C.I.G. Exploration, Inc.'s ("CIGE") motion for partial summary judgment on the claims made by plaintiffs Tim Ruyle, Jeanette Stone, Cassandra Gibbons, and Del Gordon d/b/a G.M. Properties. These plaintiffs allege CIGE breached an implied covenant to further develop their mineral interests and that CIGE failed to protect the plaintiffs' mineral interests from drainage. On February 9, 1994, plaintiffs responded to CIGE's motion. On February 28, 1994, CIGE filed a reply. The following facts set out by CIGE are not disputed by the plaintiffs except where noted.

1. Section 14, Township 12 North, Range 16 West, Custer County, Oklahoma, constitutes a 640-acre drilling and spacing unit for production from the Des Moines and other common sources of supply. **Source**: Oklahoma Corporation Commission

("Commission") Order No. 143939, Ex. B to CIGE's motion.

2. The Meacham No. 1-14 Well, which produces from the Red Fork member of the Des Moines common source of supply, was completed as the unit well for Section 14 in January 1991. **Source**: 1002A Completion Report, Ex. C to CIGE's motion.

3. Conoco Inc. is the operator of the Meacham No. 1-14 Well. **Source**: Scheduling Conference Memorandum at Stipulated Facts, paragraph III.F, Ex. D to CIGE's motion.

4. CIGE is the lessee of mineral interests owned by plaintiffs Tim Ruyle, Jeanette Stone, Cassandra Gibbons, and Del Gordon d/b/a GM Properties. **Source**: Scheduling Conference Memorandum at Stipulated Facts, paragraph III.E, Ex. D to CIGE's motion.

5. The Downing No. 1-15 Well is located in Section 15 and was completed in the Red Fork member of the Des Moines common

source of supply in April 1981. Plaintiffs claim CIGE breached the implied covenants of their oil and gas leases by failing to drill an additional well to protect the leased premises from drainage allegedly caused by the Downing No. 1-15 Well. **Sources**: Deposition of Craig Borison, pp.33-35, 39-40, 43-44, Ex. E; 1002A Completion Report, Ex. F to CIGE's motion.

6. CIGE does not own an interest in the Downing No. 1-15 well. **Source**: Affidavit of Betty J. Nelson, at ¶2, Ex. G to CIGE's motion.

7. CIGE believes the leases upon which plaintiffs' claims are based expressly excuse CIGE from liability for breach of implied covenants if compliance is prevented by, or is the result of, any federal or state laws, executive orders, rules or regulations. **Source**: Oil and Gas Leases, attached as Exhibits 1 and 2 to Affidavit of Betty J. Nelson, Ex. G to CIGE's Motion.

Plaintiffs respond the leases speak for themselves, but claim there is a factual dispute regarding the circumstances and findings of the Commission's ruling on an application to drill an additional well in Section 23. See Commission Order No. 361673, Cause CD No. 158049 (Nov. 27, 1991), part of Plaintiffs' Ex. 1. (Hereafter, Commission Order No. 361673 will be referred to as "the 1991 order.") In the 1991 order, the Commission determined "its Order ... designating ... a single drilling and spacing unit for production of hydrocarbons from the Des Moinesian common source of supply ... [is] not adequate when taking into consideration the changed conditions which now prevail, as compared to conditions as known when such well pattern and density were ordered. That it is now necessary to drill an additional well ... in order to effectuate the maximum recovery of

hydrocarbons from said common source of supply." Id. at 2 ¶¶ 3-4.

8. By Order No. 362594, entered in Cause CD No. 157684 on January 13, 1992 ("1992 order"), the Commission denied the application of Great Bear Exploration, Inc. ("Great Bear") to drill an additional well in Section 14. Source: Order No. 362594, Ex. H to CIGE's motion. In the 1992 order, the Commission found:

> 5. That the evidence presented by the Applicant's expert witnesses definitively establish [sic] that the Conoco No. 1-14 Meacham well has and will continue to recover for the owners in Section 14 in their fair share of the gas in the Des Moines common source of supply. As noted in the Initial Report of the Administrative Law Judge, the Protestant's expert engineer concluded that the Meacham No. 1-14 well will recover the gas in place under Section 14. In his opinion that well would ultimately produce 20.8 BCF. Those calculations depended upon a geological map which included intervals other than that produced by the existing unit well and offset wells. Obviously, the Applicant's

contentions that a second well is necessary to effectively develop and drain Section 14 were not proven. Moreover, the Protestant's evidence showed significantly less gas to underlie Section 14. Those calculations showed only 11.5 BCF of gas recoverable from beneath Section 14. The geological foundation for such conclusion did not attempt to include unproductive Des Moines intervals. The Protestant's engineer testified that the No.1-14 Meacham well will ultimately recover 22.6 BCF of gas. Based only upon the Applicant's evidence, giving no consideration to Protestant's evidence, these applications must be denied. The Protestant's evidence simply confirms such determination.

6. That the Protestant asserts also that an additional well drilled at the location described in Cause CD No. 157683 is necessary to protect Section 14 from drainage. The evidence presented by the Applicant, and discussed above, shows such assertion to have no merit. Given the existence of a Commission created drilling and spacing unit for the Des Moines common source of supply, the Administrative Law Judge and the Appellate Administrative Law Judge correctly noted that correlative rights of all owners in the common source of supply must be considered. The mere

> fact that Applicant wants to produce more gas for Section 14 is not the controlling factor. The operator of a unit like Section 14 is obligated to take only that unit's fair share of gas from a well in the unit. As noted in GMC Oil and Gas Co. v. Texas Oil and Gas Corp., 586 P.2d 731 (Okla. 1978), there is an affirmative duty on the part of that operator to not only protect correlative rights of owners in Section 14, but also to avoid harming the rights of offset owners through the taking of a disproportionate share of gas in the common source of supply. Protestants, including Conoco, have acted prudently in Section 14 by recovering a fair share of the gas but resisting the attempt of Great Bear to recover more than such fair share. Any drainage occurring in Section 14 is compensated for through production of the No. 1-14 Meacham well. To allow an additional well to be drilled and produced in Section 14 would result in damage to the correlative rights of owners in adjacent sections.

Cause CD No 157684, Order No. 362594, ¶¶ 5 and G. Plaintiffs argue the 1991 order substantiates the existence of factual disputes.

9. The 1992 order was affirmed on appeal and is a final order. **Sources:** Opinion of the Oklahoma Court of Appeals, order denying rehearing, and order denying certiorari in Case No. 79,063, Ex. I to CIGE's motion.

10. It is CIGE's position that the plaintiffs, both by mail and by publication, received sufficient notice. **Sources**: Certified copies of the 1992 order proceed ings, attached to CIGE's motion as Ex. H and J. CIGE's Ex. H is the 1992 order. CIGE's Ex. J is copies of the pleadings leading up to the 1992 order. Plaintiffs claim these same exhibits, along with their own Ex. 2, demonstrate the existence of factual disputes.

11. Great Bear, the applicant in the proceedings for the 1992 order assigned its rights and interest in Section 14 to Kirkland Royalty, Inc. ("Kirkland"), subsequent to the issuance of the 1992

order. **Sources**: Deposition of Toni Dial, President of Kirkland Royalty, Inc., at pp. 25-27, and Ex. 14 and 15 thereto, attached to CIGE's motion as Ex. K; Deposition of Craig Borison, President of Great Bear and former President of Kirkland Royalty, Inc., 86, 88-89 and Ex. 15 thereto, attached to CIGE's motion as Ex. E.

12. There is no dispute that plaintiffs "entered into agreements with Kirkland under which Kirkland is paying for all the expenses of this lawsuit on plaintiffs' behalf and under which Kirkland has control over this lawsuit." **Source:** Deposition of Craig Borison at pp.32-34, and Ex. 8 thereto, attached to CIGE's motion as Ex. E; Deposition of Toni Dial, p.48, Ex. K to CIGE's motion. Affidavit of Betty J. Nelson ¶ 3, Ex. G to CIGE's Motion. CIGE's Statement of Undisputed Material Facts, ¶ 12. However, plaintiffs claim they obtained no interest from Kirkland and direct the

Court's attention to their Ex. 3, which is copies of plaintiffs' Lease Option Agreements ("LOAs").

13. CIGE was not a party in Robert and Elizabeth Ruyle, et al. v. Continental Oil Co., No. CIV-91-379-W, United States District Court for the Western District of Oklahoma. CIGE did not acquire its interest in Section 14 from Conoco. **Source**: Affidavit of Betty J. Nelson, ¶ 3, Ex. G to CIGE's Motion.

The following is a list of plaintiffs' supplemental facts, together with CIGE's responses.

1. Plaintiffs claim since the Commission proceedings and the 1992 order, there has been a change in knowledge concerning the drainage issue. **Source**: Judgment in Ruyle v. Continental Oil Co., No. CIV-91-379-W, W.D. Okl. (Sept. 3, 1992), reflecting the jury's verdict for plaintiffs on claims of breach of implied duty to

develop, tortious breach of implied duty to protect against drainage, and breach of fiduciary duty.

2. Plaintiffs claim the drilling of another well in Section 23 establishes there has been a change in conditions since the Commission proceedings. **Source**: 1991 order permitting the drilling of another well in Section 23 to test and produce the Des Moinesian common source of supply and the judgment in Ruyle.

The 1992 order denied an application to drill an additional well in Section 14. As to the facts plaintiffs describe in ¶¶ 1 and 2 above, CIGE maintains until the 1992 order is vacated or modified, it is binding on the parties. Further, CIGE points out it was not involved in, or connected to, the Ruyle litigation.

3. Plaintiffs acknowledge the Commission determined that Section 14 was being drained. **Source**: 1992 order. CIGE

relies on ¶¶ 5 and 6 in the 1992 order as support for its position that the Commission also found the drainage was not uncompensated.

4. The 1992 order did not deal solely with the relationship between the wells located on Section 15 and Section 14, but dealt with production from all adjacent sections. **Source**: 1992 order. CIGE did not dispute this statement of fact.

5. Although plaintiffs claim it is undisputed that "CIG[E] has never taken any action to protect section 14 from drainage," this will be treated as a conclusory allegation as plaintiffs offer no support for this fact.

6. Plaintiffs have their own independent rights in Section 14 by virtue of their ownership of oil and gas minerals. **Source**: CIGE's Ex G. CIGE did not dispute this statement of fact.

7. Plaintiffs suggest since the Commission proceedings, evidence now exists to show Section 14 has been drained. Plaintiffs rely on the jury verdict in Ruyle v. Continental Oil Co., CIV-91-379W, W.D. Okla. CIGE points out it was not a party to the Ruyle litigation, or in privity with any party.

8. Plaintiffs claim some of them were not notified of the Commission's proceedings. In ¶ 10, plaintiffs state they "have never sought any relief from the [Commission]." CIGE responds that examination of the face of the Commission proceedings, the only appropriate review for this Court to conduct, establishes notice was given to all plaintiffs.

DISCUSSION

The mission of the summary judgment procedure is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."

Matsushita Elec. Indus. Co.v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Advisory Committee Note to Fed. R. Civ. P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party there is no 'genuine issue for trial'," and summary judgment can be granted. Id., at 587 (citation omitted). Once the moving party points out the absence of evidence to create a "genuine issue" of a "material fact" on which the non-moving party bears the burden of proof at trial, the Supreme Court imposes a burden on the non-moving party. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The non-moving party must set forth specific facts showing there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the

outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. The question in a case for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

The gravamen of this litigation is plaintiffs' claim that CIGE failed to develop plaintiffs' mineral interests and protect them from drainage. To prevail, plaintiffs must establish there was substantial, uncompensated drainage and that a prudent operator would have drilled another well in Section 14. Leck v. Continental Oil Co., 971 F.2d 604, 606 (10th Cir. 1992); Ramsey Petroleum Corp. v. Davis, 85 P.2d 427, 431 (Okla. 1938).

FINDINGS AND CONCLUSIONS

The parties' lease provides:

> All express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules and Regulations, and this lease shall not be terminated in whole or in part, nor lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or such failure is the result of any such Law, Order, Rule or Regulation.

The Commissions' orders are facially valid. Commission orders are "regarded as prima facie, valid, reasonable and just." 52 Okla. Stat. § 111. The only avenue to review a Commission order is through an appeal to the Oklahoma Supreme Court. Id. See also SKZ,Inc. v. Petty, 782 P.2d 939, 943 (Okla. 1989) ("To be successful, a collateral challenge to a Commission order must show, from the face of the record in the prior proceedings, that at least one of three elements of jurisdiction was absent: jurisdiction over the parties, jurisdiction over the subject matter or jurisdictional power to pronounce the decision under

challenge." (citation omitted)); Drake v. Southwest Davis Unit, 698 P.2d 15 (Okla. 1985) (Clarification or review of Commission is generally limited to examination of Commission orders to determine whether the Commission is generally limited to examination of Commission orders to determine whether the Commission had jurisdiction to enter the order." (citations omitted)). The Commission's 1992 order was affirmed on appeal and is a final order.

Jurisdiction Over the Parties

Plaintiffs received notice of the proceedings that culminated in the Commission's 1992 Order. In that order, the Commission recognized proper notice had been given. 1992 Order, Findings ¶ 3 ("notice has been given in all respects as required by law and by the rules of the Commission"). Because the 1992 order recognizes proper notice was given, and because the pleadings establish notice was sent to the plaintiffs,

this Court may not consider extrinsic evidence. Kaneb Production Co. v. GHK Exploration Co., 769 P.2d 1388, 1392 (Okla. 1989); Harry R. Carlile Trust v. Cotton Petroleum Corp., 732 P.2d 438, 441 (Okla. 1986), cert. denied 483 U.S 1021 (1987). Plaintiffs' absence at the Commission's proceedings does not change this result. Swift & Co. v. Walden, 55 P.2d 71, 79 (Okla. 1935). In any event, it is undisputed that plaintiffs executed LOAs with Kirkland and that Kirkland is directing the course of this litigation. See CIGE's undisputed facts Nos. 11 and 12.

Jurisdictional Power and Jurisdiction Over the Subject Matter

The Commission had jurisdiction to determine whether an additional well should be drilled in Section 14. 52 Okla. Stat. § 87.1, 17 Okla. Stat. § 52. The Commission also had jurisdiction over the plaintiffs, as they received proper notice of the

proceedings. Plaintiffs argue they seek to enforce private, rather than public rights, and that the Commission is not the proper adjudicator of their claims. However, the real issue here is whether an implied covenant has been breached as a result of substantial uncompensated drainage. Drainage and correlative rights are directly related. Leck, 971 F.2d at 606. The Commission has jurisdiction to order the drilling of another well to protect from drainage. See generally Spaeth v. Corporation Commission, 597 P.2d 320 (Okla. 1979).

Paragraphs 5 and 6 of the Commission's 1992 order make three clear statements related to the issues now before the Court. The Commission's 1992 order provides 1) the owners in Section 14 are recovering their fair share of gas from the Des Moines common source of supply; 2) there is no need for an additional well to protect Section 14 from

drainage; and 3) any drainage occurring in Section 14 is being compensated through other production. Plaintiffs' claim that CIGE breached an implied covenant fails as a matter of law because plaintiffs cannot prove an essential element -- that plaintiffs are suffering substantial uncompensated drainage. See Leck, 971 F.2d at 606; Ramsey, 85 P.2d at 431. This conclusion was specifically addressed by the Commission when it found "[a]ny drainage occurring in Section 14 is compensated for through production of the No. 1-14 Meacham well." Having received notice of the Commission's proceedings that culminated in the 1992 order, plaintiffs are collaterally estopped from relitigating the drainage issue. See State ex rel. Barnett v. Wood, 43 P.2d 136, 138 (Okla. 1935) (quoting American Bank & Trust Co. of Ardmore v. Frensley, 30 P.2d 883 (Okla. 1934). Moreover, even if CIGE's actions did

constitute a breach of an implied covenant, the parties' lease protects CIGE from damages where compliance is prevented by state law, rule, executive orders, rules, or regulations.

Plaintiffs' contention that the 1992 order does not reach the issue of whether there was drainage before or after the entry of the 1992 order is without merit. Plaintiffs offer no evidence to support this contention.

In summary, the Commission's orders are facially valid and binding until they are modified or vacated. The Commission determined an additional well in Section 14 should not be drilled. CIGE's actions, in light of the Commission's findings, do not constitute a breach of an implied covenant. By operation of the Commission order and a provision in the parties' lease, CIGE cannot be liable for damages for failure to drill an additional well in Section 14.

Accordingly, CIGE is entitled to the relief it seeks in this motion.

IT IS THEREFORE ORDERED CIGE'S motion for partial summary judgment is GRANTED and CIGE is entitled to judgment as a matter of law on plaintiffs' claim for breach of the implied covenants to develop and protect against drainage. A judgment will enter at the conclusion of the case.

IT IS SO ORDERED this 14th day of April, 1994.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, JEANETTE STONE, CASSANDRA GIBBONS, DEL GORDON, d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE Q. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	)	Filed May 19, 1994
Plaintiffs,	)	No. CIV-93-574-C
KIRKLAND ROYALTY, INC.,	)	
Additional Plaintiff,	)	
v.	)	
CONOCO, INC. (formerly Continental) Oil Company) and C.I.G. EXPLORATION, INC.,	)	
Defendants.	)	

ORDER

Upon the Joint Motion of the Plaintiffs, the Additional Plaintiff and the Defendants in this action for a certification under Rule 54(b) of the Federal Rules of Civil Procedure and for a stay of claims against Additional Plaintiff pending appeal of final judgment, and upon review of the pleadings filed herein, the Court finds that such Joint Motion should be granted.

IT IS THEREFORE ORDERED that, based upon the showing made by the parties in their Joint Motion, the Court hereby certifies and determines pursuant to Rule 54(b) that there is no just reason for delay of an appeal of the Court's two summary judgment rulings against the Plaintiffs in this action, entered on April 14, 1994, which rulings entered judgment against the Plaintiffs on all of their claims in this action, except for the royalty under-payment claims of the Plaintiffs which counsel have

represented will be dismissed from this case without prejudice. The Court hereby directs the Clerk of the Court to reflect the entry of final judgment against the Plaintiffs with respect to such claims.

IT IS FURTHER ORDERED that the prosecution of the Defendant Conoco's claims against the Additional Plaintiff, Kirkland Royalty, Inc., is hereby stayed pending the outcome of the Plaintiffs' appeal of the Court's aforesaid Final Judgment.

IT SO ORDERED this 19 day of May, 1994.

s/ Robin J. Clauthron
ROBIN J. CLAUTHRON
UNITED STATES DISTRICT JUDGE

423.94A.MDC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

RUTH FRANSEN, MARTHA HARMS, ELSIE HINZ, WILSON MAHONE, MARY GENE McCOY, TIM RUYLE, JEANETTE STONE, CASSANDRA GIBBONS, DEL GORDON, d/b/a G.M. PROPERTIES, and ORMAN E. McCARTNEY, JR. and ROSALINE Q. McCARTNEY, Trustees under the McCartney Family Trust as amended and restated April 17, 1986,	Filed June 24, 1994
Plaintiffs,	
vs.	Case No. CIV-93-574-C
CONOCO, INC. (formerly Continental Oil Company) and C.I.G. EXPLORATION, INC.,	
Defendants,	
vs.	
KIRKLAND ROYALTY, INC.,	
Third Party Defendant, and Additional Defendant to Counterclaims.	

O R D E R

On April 14, 1994, the Court entered its rulings on the motions for partial summary judgment. At the request of the parties by motion filed May 18, 1994, the Court entered a final entry of judgment as to the two summary judgment rulings against plaintiffs in this action. (Order, May 19, 1994). The May 19, 1994, Order also certified and determined, pursuant to Rule 54(b) that there was no just reason for delay of an appeal of the summary judgment rulings against plaintiffs.

On June 20, 1994, plaintiffs filed a motion for reconsideration of the Court's summary judgment rulings against plaintiffs. Motions to reconsider are not favored and are generally improper except where there is a new development in the law or where it is clear the Court was operating under a misconception. The ground on which the motion to reconsider is based involves plaintiffs' conclusory unsupported statement

that the decision reached by the Oklahoma Corporation Commission, which is discussed in the Court's order on the motion for partial summary judgment, "was procured through breach of defendants' fiduciary duty by opposing plaintiffs' application and also by concealment of information." Brief at 4 (June 20 1994). Not only does this allegation come too late in time to permit the Court's consideration, the avenue to review a Commission order is through an appeal to the Oklahoma Supreme Court, as the parties were previously advised. (Order, April 14, 1992)

On June 22, defendants Conoco, Inc. and C.I.G. Exploration, Inc. filed a motion for clarification. The substance of the motion is dealt with in the first paragraph of this Order. Accordingly, the motion will be denied.

IT IS THEREFORE ORDERED that plaintiffs' motion for reconsideration is

DENIED; defendants' motion for clarification is DENIED.

IT IS SO ORDERED this 24 day of June, 1994.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE